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7 **UNITED STATES DISTRICT COURT**
8 **DISTRICT OF NEVADA**
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10 UNITED STATES OF AMERICA,

11 Plaintiff,

12 v.

13 ROBERT JOSEPH MARSHALL,

14 Defendant.
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Case No. 2:01-cr-00130-LDG (LRL)

ORDER

16 The defendant was convicted, by jury, of distribution and conspiracy to distribute one
17 kilogram of cocaine. This court sentenced the defendant to **262 months** incarceration *prior*
18 to *United States v. Booker*, ___ U.S. ___, 125 S.Ct. 738 (2005), which decision rendered
19 the guidelines advisory. (That is, the court sentenced the defendant when the guidelines
20 were mandatory.) The Ninth Circuit Court of Appeals affirmed the defendant's conviction,
21 but remanded pursuant to *United States v. Ameline*, 409 F.3d 1073 (9th Cir. 2005) (*en*
22 *banc*). This court heard arguments on this matter on April 28, 2006, at which time it made
23 oral findings that it would not impose a materially different sentence. The present order
24 shall constitute a further written explanation.

25 Under *Ameline*, the threshold question for this court to resolve is whether it would
26 have imposed a materially different sentence **if** the court had known that the sentencing

1 guidelines were advisory rather than mandatory. If the court determines that it would have
2 imposed a materially different sentence had it known that the guidelines were advisory, the
3 court must vacate the original sentence and re-sentence the defendant, with the defendant
4 being present. Conversely, if the court determines that it would have not imposed a
5 materially different sentence, the court must make that decision on the record and provide
6 an appropriate explanation.

7 Initially, the court notes that, for the reasons that were stated on the record at the
8 defendant's sentencing hearing, the *advisory* guideline range is **262 - 327 months**. Briefly
9 stated, pursuant to §4B1.1, the defendant is a career offender as he was convicted (in the
10 present matter) of a qualifying felony conviction when he was more than 18 years old, and
11 he had at least two qualifying prior felony convictions. As a career offender, the
12 defendant's Total Offense Level is 34, and his Criminal History Category becomes VI.

13 The determination that the defendant is a career offender takes into consideration
14 the defendant's 1981 conviction, because the defendant's parole for that conviction was
15 revoked in 1987. As a result of that revocation, the defendant served a portion of his
16 sentence for that offense within 15 years of the commission of the underlying offense in
17 this matter. The defendant has objected to this determination, arguing that the court
18 should not consider his 1981 conviction because of its age, because the government had
19 not established that his parole was revoked, and because the government had not
20 established that the defendant voluntarily and knowingly waived his right to counsel at his
21 parole revocation. However, as found by this court at the original sentencing hearing, the
22 government met its burden of establishing the fact of the prior conviction, the fact of the
23 parole revocation for that conviction, and the fact that the defendant voluntarily and
24 knowingly waived counsel at the parole revocation.

25 In seeking a re-sentencing hearing, the defendant argues that this court can only
26 consider the formal record of conviction documents, and thus is prohibited from looking to

1 the certified records that the government lodged with this court that plainly establish that
2 the defendant *violated* his parole on that conviction, that his parole was revoked and that
3 he was sentenced to a term of incarceration that extended to within 15 years of the
4 commission of the offense in this matter. The court disagrees with the defendant that it is
5 prohibited from considering certified documents establishing the defendant's revocation of
6 parole for his 1981 conviction.

7 The issue remaining before this court is whether, after considering all §3553(a)
8 factors and considering the advisory guideline range (as merely advisory), the court would
9 have imposed a materially different sentence. Pursuant to §3553, this court has a duty to
10 imposed a sentence that will be sufficient, but not greater than necessary, to comply with
11 the purposes of the Sentencing Reform Act. As noted, the advisory guideline range is 262
12 - 327 months. The court has also considered the nature and circumstances of the offense
13 and the history and characteristics of the defendant, as well as the need for the sentence
14 to reflect the seriousness of the offense, to promote respect for the law, to provide just
15 punishment, to afford adequate deterrence to criminal conduct, to protect the public from
16 further crimes of the defendant, to provide the defendant with needed education, training
17 and medical care. In addition, the court has considered the kinds of sentences available,
18 any pertinent policy statements of the Sentencing Commission, the need to avoid
19 unwarranted sentencing disparities, and the need to provide for restitution.

20 In arguing for a finding that the court would have imposed a materially different
21 sentence, the defendant relies primarily upon the disparity of sentences between the
22 defendant and other participants in the criminal offense underlying the defendant's
23 conviction. The argument strongly reflects the same argument made by the defendant at
24 his sentencing in support of his motion for a downward departure. The court would note
25 that, because the guidelines are advisory, the court must apply a different standard in
26 weighing the disparity in sentencing. Under the mandatory guideline system, the weight


1 given to this factor (which is set forth at §3553(a)(6)) would depend largely on whether it
2 would result in a sentence within or without the guideline range. As such, prior to *Booker*, if
3 the avoidance of an unwarranted disparity required a sentence *outside* of the guideline
4 range, the court was required to find that the facts warranted a departure because they
5 were outside the heartland of cases.

6 By contrast, now that the guidelines are advisory, the court is not so limited. Rather,
7 the court may, and indeed must, consider this factor as one of several factors in the effort
8 to determine a sentence that is sufficient while not being greater than necessary. The
9 court has taken into consideration the sentences and treatment of the other criminal
10 participants in the underlying offense to determine whether it would have imposed a
11 materially different sentence upon the defendant.

12 As found by this court at the original sentencing hearing, the justification for the
13 sentence that the court imposed was the "lifetime criminal activity of the defendant." His
14 criminal record began when he was 27, and reveals his prompt return to criminal activity
15 each time that he was released from incarceration. As noted by this court, the only reason
16 the defendant's criminal record isn't longer appears to be because he has been
17 incarcerated for most of his adult life. For these reasons and those stated at the April 28,
18 2006 hearing,

19 THE COURT **ORDERS** that it would not have imposed a materially different
20 sentence if it had known, at the original sentencing of the defendant in 2003, that the
21 guidelines were advisory.

22 DATED this 8th day of June, 2006.

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24 
25 Lloyd D. George
26 United States District Judge